BRIEF IN SUPPORT OF PETITION

JURISDICTION

The jurisdiction of this court is invoked under section 240 (a) of the Judicial Code (28 U. S. C. A. 347) as amended. The judgment of the Circuit Court affirming the conviction was entered November 15, 1944.

STATEMENT OF THE CASE

The Statement of the Case is set forth on pages 1 and 2 of the Petition for the Writ of Certiorari.

SPECIFICATIONS OF ERROR

1. The court below erred in sanctioning the consolidation of an indictment for conspiracy with another indictment containing counts of offenses wholly unrelated to the conspiracy.

2. The court below erred in sanctioning the trial of a defendant on an indictment charging him with conspiracy with a single named and available co-conspirator who has not been indicted.

Specifications of Error

3. The court below erred in sanctioning the admissions against the defendant of declarations of an alleged co-conspirator before the conspiracy was shown and before evidence was adduced that the defendant was a party to the conspiracy.

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4. The court below erred in sanctioning a charge to the jury which states that the only purpose character evidence serves is to tip the scales when there is reasonable doubt.

ARGUMENT

1. THE INDICTMENTS WERE IMPROPERLY CONSOLIDATED FOR TRIAL

Indictment No. 11968 charged the defendant with conspiracy with Simon Kagan to violate the Emergency Price Control Act of 1942 (56 Stat. 28, 50 U. S. C. A. 904). Indictment No. 11967 charged defendant with the substantive acts of No. 11968, and with other acts in which the co-conspirator Kagan was in no way involved. Appellant would have no quarrel with the consolidation if Indictment No. 11967 contained only the substantive acts of the conspiracy charged in Indictment No. 11968. The joinder of other acts independent of the conspiracy was clearly confusing to the jury and prejudicial to the defendant. Even the trial judge himself was confused when he charged the jury as follows (Appendix 33a):

> "You have the testimony, in addition to Mr. Kagan, of at least one of these men who claims to have gone to and paid over this extra money to the defendant himself. If you believe that, that is corroborative of Kagan's testimony; and then you have the testimony of the other witnesses with respect to the method and means of dealing in this matter."

It is respectfully submitted: How can the testimony of the witness in a transaction independent and in no way growing out of the conspiracy corroborate the conspiracy with Kagan?

Argument

The Act relating to the joinder of charges provides:

> "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated." (R. S. Sec. 1024). 18 U. S. C. A. 557.

The consolidation of indictments authorized by this section is only in cases where the offenses charged in separate indictments might have been embraced in separate counts of one indictment:

McElroy v. United States, 164 U. S. 76;
DeLuca v. United States, 299 F. 741 (C. C. A. 2, 1924);
Castellini v. United States, 64 F. (2) 636 (C. C. A. 3, 1933).

Thus in the *DeLuca* case, *supra*, where one indictment against nine defendants charged a conspiracy to defraud the United States by removal of opium from a bonded warehouse without payment of the duty thereon, and a second indictment against five defendants charged a sale of opium in violation of the Harrison Narcotic Act, and the two offenses had no relation to each other, and the opium involved was not the same, it was held that a consolidation of the indictments for trial over objection was reversible error.

In the *Castellini* case, *supra*, the court in our own Third Circuit said:

> "We cannot but regard it as prejudicial to the right of a fair and impartial trial, that (defendant) should be required to stand trial at the same time and before the same jury upon twenty-five counts of one indictment, each charging him jointly with two others with a felony, and upon two counts of another indictment, each charging him jointly with one other with another and distinct felony."

Even in one indictment it is improper to combine counts for different offenses for which different penalties are prescribed: *United States v. Cleveland*, 281 F. 249 (D. C. Ala. 1922).

It should be noted that the penalty for violation of the Emergency Price Control Act is "a fine of not more than $5,000, or imprisonment of for not more than two years in the case of violation of section 4 (c) and not more than one year in all other cases, or both such fine and imprisonment": (Act Jan. 30, 1942, c. 26 Tit. II, Section 205; 56 Stat. 33 (a), 50 U. S. C. A. 925), while the penalty relating to conspiracy is a fine "of not more than $10,000 or imprisonment of not more than two years or both." (35 Stat. 1096; 18 U. S. C. A. 88).

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2. THE INDICTMENT OF ONE OF TWO CONSPIRATORS WITH IMMUNITY TO THE OTHER

The defendant was charged with conspiracy with Simon Kagan. The defendant alone was indicted. Kagan was available and testified against the defendant.

Argument

Where only two persons are charged as conspirators, it results that, except in extreme cases, such as the death of one of the alleged conspirators or his absence from the jurisdiction, unless both can be legally convicted, neither can be: *Alkon v. U. S.* (Mass. 1908), 163 Fed. 810, 90 C. C. A. 116).

Hence if one of two defendants charged with conspiracy is acquitted, the other must also be acquitted; and if the charge against one be nol. pros'd, the other cannot afterwards be convicted: *U. S. v. Wray* (D. C. Ga. 1925), 8 F. (2d) 429; *Miller v. U. S.* (C. C. A. S. C. 1921), 277 F. 721; *Feder v. U. S.* (C. C. A. N. Y. 1919), 257 F. 694; *U. S. v. Hamilton* (C. C. Ohio, 1876), Fed. Cas. No. 15,288.

Counsel for appellant is not unmindful of the decision of the court in *United States v. Fox*, 130 F. (2d) 56 (C. C. A. 3, 1942), but respectfully submits that the distinguishing features in the *Fox* case are that the one conspirator actually pleaded guilty and that the other conspirators were actually indicted.

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3. ON THE IMPROPRIETY OF ADMITTING TESTIMONY OF A CO-CONSPIRATOR BEFORE PROOF OF THE CONSPIRACY AND BEFORE EVIDENCE THAT DEFENDANT WAS A PARTY TO THE CONSPIRACY

The conspiracy charged was between defendant and Kagan. Before the conspiracy was shown and before evidence was adduced that the defendant was a party to such conspiracy, Kagan was permitted to testifiy, over the objection of the defendant (Appendix 22a). There was no

testimony as to the conspiracy or the defendant's participation other than Kagan's.

In our own Third Circuit it was definitely held in the case of *Pope v. United States*, 289 F. 312 (1923), that before declarations of an alleged co-conspirator can be admissible, the conspiracy must be shown, and it must also be shown that the defendant against whom the evidence was offered was a party to such conspiracy. This is merely the old familiar principle of the requirement of establishing the *corpus delicti* first.

See also *Stager v. United States*, 233 U. S. 51.

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4. THE CHARGE ON THE PROBATIVE VALUE OF CHARACTER EVIDENCE WAS IMPROPER

The defendant requested the trial court to charge (Appendix 43a):

> "8. The Court is requested to charge the Jury that a defendant who enjoys a good reputation in his community may introduce evidence of his good character, and that a good reputation in a community may be enough in itself to create a reasonable doubt."

This the court refused, but stated "I will give the substance of (point) No. 8 according to my own conception of the law". The trial judge then in the course of his charge said as follows (Appendix 30a):

> "* * * but that is evidence to be considered for whatever it is worth. If the issue is close upon the question of a reasonable doubt with respect to the

weight of the evidence, then evidence of good character may serve to cast the scale in favor of the defendant; in other words, it may be sufficient to create in your mind a reasonable doubt, and if it does, then it is your duty to give the defendant the benefit of that reasonable doubt."

This is clearly erroneous: *Edgington v. United States*, 164 U. S. 361 (1896).

In *United States v. Dewinsky*, 41 F. Supp. 149 (U. S. Dist. Ct. E. D. Pa. 1941), Judge Goodrich in a thorough discussion on the probative value of character evidence, says (at page 151):

"* * * Admissibility being established the question arises, what position shall be taken about the weight of such evidence. May it (1) be considered only in a doubtful case; (2) be treated like any other evidence for whatever effect the trier of the fact believes it to be entitled, or (3) is a defendant entitled, as a matter of right, to have it especially emphasized in a charge by the judge to the jury?

"Edgington v. United States, 1896, 164 U. S. 361, 366, 17 S. Ct. 72, 74, 41 L. Ed. 467, is the starting point in the discussion of the questions just stated. Mr. Justice Shiras points out in that case that the trial judge had charged the jury that evidence of good character could be considered only if the rest of the evidence created a doubt of the defendant's guilt. This the court said was incorrect and in so holding remarked: '* * * circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt,

although, without it, the other evidence would be convincing.' That decision clearly establishes that character testimony is not to be given a limited effect by the trial court in its instruction to the jury. It certainly does not impose a duty on the trial court to single out this phase of the testimony for special instruction, although the language obviously does say that evidence of good reputation may create a doubt that a person charged with crime committed it. Apart from legal doctrine this is certainly true as a matter of common sense and is the basis for the admission of the evidence in the first instance."

It is therefore respectfully submitted that the judgment of the court below should be reversed.

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